82-1453

No.

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In The

Supreme Court of the United States

October Term, 1982

ERNEST BADARACCO, SR. and ROSE BADARACCO, ERNEST BADARACCO, JR. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Section 6501(c)(1), I.R.C. 1954, providing for an unlimited period for assessment, is the governing statute when subsequent to the filing of a document purporting to be an original return, but which at a later date is determined by the Commissioner to be fraudulent, there is filed an amended return which is in all respects non-fraudulent; or, whether the non-fraudulent return commences the running of the three year statute of limitations, as to such a return, as provided by Section 6501(a), I.R.C. 1954.

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No.

In The

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ERNEST BADARACCO, Sr. and ROSE BADARACCO, ERNEST BADARACCO, Jr. and BARBARA BADARACCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet officially reported, is annexed hereto in Appendix C. The opinion of the United States Tax Court, reported as T.C. Memo 1981-404, is annexed hereto in Appendix D.

JURISDICTION

The judgment of the Court of Appeals, annexed hereto in Appendix B, was entered on November 29, 1982. A petition for

rehearing en banc was denied on December 20, 1982. A copy of the order of denial is annexed hereto as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 6501, I.R.C. of 1954 as amended:

> (a) [as amended by Sec. 165(a), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1275] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
>
> • • •
>
> (c) *Exceptions.*—
>
> (1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

Section 6653, I.R.C. of 1954 as amended:

> (b) [as amended by Sec. 19(d), Revenue Act of 1962, Pub. L. No. 97-834, 76 Stat. 960, and by Sec. 313(e)(2)(B), Health Insurance for the Aged

Act, Pub. L. No. 89-97, 79 Stat. 290] *Fraud*—If any part of the underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

STATEMENT

These cases arose as a result of petitions which were filed by the taxpayers in the United States Tax Court from statutory notices issued by the Commissioner of Internal Revenue. Jurisdiction of the Tax Court is based upon Section 6213, I.R.C. of 1954.

The facts of the cases are undisputed having been fully stipulated in the record before the Tax Court. The relevant facts are as follows:

The taxpayers had filed timely federal income tax returns for each of their taxable years 1965 to 1967. The return for the taxable year 1968 was filed on May 28, 1969. On August 17, 1971 they filed "amended" returns revealing increases in reportable distributable partnership income over the amounts shown on the original returns. The additional taxes shown on the "amended" returns were paid with the filing. The Commissioner assessed the additional tax. As a result there was no deficiency or payment in tax with respect to the "amended" returns.

On November 21, 1977, more than six years after the amended returns were filed, the Commissioner issued statutory notices proposing the assessment of the addition to the tax under Section 6653(b), I.R.C. 1954. Taxpayers filed timely appeals with the United States Tax Court.

The cases were submitted to the Tax Court, Judge Parker presiding. The sole issue for decision was the interrelationship of subsections (a) and (c)(1) of Section 6501, I.R.C. of 1954, when a non-fraudulent return is filed subsequent to a purported return which is at a later date determined by the Commissioner to be fraudulent in nature. One of the stipulations filed by the parties was a concession on behalf of the taxpayers that the purported original returns were fraudulent in nature. The relevant positions of the Commissioner and the taxpayers were that the Commissioner contended that the filing of a non-fraudulent return has no effect upon the application of Section 6501(c)(1), *supra*, which provides for an unlimited period of assessment; the taxpayers contended that the filing of a non-fraudulent return invokes the operation of the three year period of limitations under Section 6501(a), *supra*, as to said non-fraudulent return. A proposed assessment therefore later than three years after the filing of a non-fraudulent return would be time barred.

After the petitions had been filed, and before the cases were submitted for trial, the Court of Appeals for the Tenth Circuit rendered its opinion in *Dowell v. Commissioner*, 614 F. 2d 1263, 80-1 USTC para. 9216 (10th Cir. 1980). The *Dowell* case concerned this specific issue. The decision of the Tenth Circuit reversed a decision of the Tax Court, 68 T.C. 646 (1977). The Tax Court in *Dowell* had held in favor of the position advocated by the Commissioner. In reversing, the Tenth Circuit decided in favor of the position advocated by the taxpayer.

The taxpayers in the instant cases relied upon the precedent established by the Tenth Circuit. At the same time that the instant cases were being reviewed by the Tax Court, the Court was also reviewing the issue in another case, and on the same day it rendered its decisions in both the instant cases and in *Klemp v. Commissioner,* 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744), holding in favor of the taxpayers. The opinion in the instant cases merely follows the opinion in *Klemp, supra,* annexed hereto in Exhibit E. It is therefore necessary to refer to that opinion in evaluating the Tax Court's reasoning which reversed its previous holding in *Dowell, supra,* and followed the analysis of the Tenth Circuit in the reversal of *Dowell, supra.* The Commissioner filed an appeal with the Third Circuit, which reversed the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has promulgated an opinion which is in direct conflict with decisions of the Tenth and Second Circuits.

We have observed that this issue was initially the subject of opinions by the Tax Court and the Tenth Circuit. Subsequent to these decisions the issue has also been decided in favor of the taxpayer in *Britton v. United States,* 532 F. Supp. 275, 81-2 USTC para. 9739 (D. Vt. 1981). This District Court decision has been affirmed by the Second Judicial Circuit without opinion (2d Cir. April 15, 1982).

A companion case to these cases in the Third Circuit, and decided in the same opinion, is *Deleet Merchandising Corp. v. United States.* This case was decided in favor of the taxpayer by the District Court for the District of New Jersey cited at 535 F.

Supp. 402, 82-1 USTC para. 9184 (D.N.J. 1981), *rev.* (3rd Cir. Nov. 29, 1982).

The United States Tax Court has followed its opinion in the *Klemp, supra,* case in a line of subsequent cases. *See Espinoza v. Commissioner,* 78 T.C. 412 (1982); *Kramer v. Commissioner,* T.C. Memo 1982-308, 44 T.C.M. 42; *Nesmith v. Commissioner,* T.C. Memo 1982-56, 42 T.C.M. 1269, on appeal (5th Cir. No. 82-4162); *Galvin v. Commissioner,* T.C. Memo 1982-689.

The issue of the statute of limitations is always of prime importance in the administration of law. Any decision which has as its result an influence which is contrary to opinions or holdings in other circuits, and in the lower courts, should be reviewed by this Court in order to resolve the conflict, and afford consistency between circuits.

II.

These cases present an important question with respect to the administration of federal tax law which should be resolved by this Court.

In addition to presenting a matter of a conflict between circuits, the subject opinion of the Third Circuit involves the important question as to the interpretation of statutory provisions of the Internal Revenue Code relating to the applicability of the statute of limitations.

The opinion of the Third Circuit was divided two to one. The division of the panel exhibits a dichotomy of inquiry into the standard to be employed when searching into the statutory scheme of Section 6501, *supra,* specifically the interrelationship between subsections (a) and (c)(1). The position of the majority is that Section 6501(c)(1), *supra* is "clear upon its face", and

because there is "nothing" in the Code, legislative history or the Commissioner's regulations to indicate that the filing of an amended return has any impact upon subsection (c)(1) then said subsection is controlling. The dissent postulates that merely reading the literal words of the statute does not end the inquiry into the statutory scheme; that if there are persuasive considerations for examining beyond the literal wording, then further inquiry should be made. The dissenting opinion cites in support thereof the decision of this Court in *Watt v. Alaska,* 451 U.S. 259, 266 (Sup. Ct. 1981) and cases cited therein. The dissenting judge identifies the critical inquiry as not being the clarity of the literal words of the statute when the situation involves the filing of an original return which is determined to be fraudulent, but rather the *lack of clarity* when the situation involved is the subsequent filing of a non-fraudulent amended return. It is because of this lack of clarity, the dissent argues, that the inquiry should go beyond the literal words of the statute. In support of his position the dissenting judge identifies "sufficient persuasive evidence", as suggested by the *Watt v. Alaska, supra,* case. He also recognized that the *Dowell, supra,* case presented a reasonable alternative interpretation of the statute. Except to state that it disagreed with the Tenth Circuit the majority holding does not give consideration to or analysis of the *Dowell, supra,* case. The Tenth Circuit indulged in an analysis of the legislative history of the pertinent statute, and interpreted such in the light of congressional intent. This was not analyzed by the majority.

The decision of the Third Circuit therefore, presents an important inquiry with respect to statutory construction of vital administrative provisions of the Internal Revenue Code; which together with the conflict between sister circuits suggests that the decision should be reviewed by this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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& FRADKIN
Attorneys for Petitioners

APPENDIX A — SUR PETITION FOR REHEARING *EN BANC* OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *BADARACCO v. COMMISSIONER OF INTERNAL REVENUE*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3033

ERNEST BADARACCO, SR., et al. v. COMMISSIONER OF INTERNAL REVENUE, ERNEST BADARACCO, JR., et al. v. COMMISSIONER OF INTERNAL REVENUE,

Respondent

(T.C. Docket Nos. 1700-78 & 1701-78)

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Dated: Dec 20, 1982

By the Court,

s/ Art M. Adams
Circuit Judge

APPENDIX B — JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3033

ERNEST BADARACCO, SR., AND ROSE BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE
(T.C. No. Docket No. 1700-78)
ERNEST BADARACCO, JR. AND BARBARA BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE
(T.C. Docket No. 1701-78)
Commissioner of Internal Revenue,
Appellant in No. 81-3033

(T.C. Nos 1700-78 & 1701-78)

No. 82-5171

DELEET MERCHANDISING CORP.

vs.

THE UNITED STATES OF AMERICA,
Appellant in No. 82-5171

(D.C. Civ. No. 80-00026)

Appendix B

ON APPEAL FROM THE UNITED STATES
TAX COURT and THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, HUNTER and BECKER, *Circuit Judges*

These causes came to be heard on the records from the United States Tax Court and the United States District Court for the District of New Jersey and were argued by counsel September 16, 1982.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court entered August 11, 1981, and the judgment of the said District Court, entered December 23, 1981, be and the same are hereby reversed and the causes remanded to the said Courts for further proceedings in accordance with the opinion of this Court.

ATTEST:

s/ Sally Muros
Clerk

Certified as a true copy and issued in lieu of formal mandate as to No. 81-3033 on December 28, 1982.
Test: M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit

November 29, 1982

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-3033 and 82-5171

ERNEST BADARACCO, SR. and ROSE BADARACCO,
ERNEST BADARACCO, JR. and
BARBARA BADARACCO,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellant in No. 81-3033

ON APPEAL FROM THE UNITED STATES TAX COURT

Docket Entries Nos. 1700-78 and 1701-78

DELEET MERCHANDISING CORP.

v.

UNITED STATES OF AMERICA,
Appellant in No. 82-5171

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 80-00026

Argued September 16, 1982

Before: ADAMS, HUNTER and BECKER, *Circuit Judges*

(Filed November 29, 1982)

Appendix C

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Appendix C

OPINION OF THE COURT

ADAMS, *Circuit Judge*.

These two appeals[1] concern the effect of filing nonfraudulent, amended income tax returns, subsequent to the filing of fraudulent original returns, on the statute of limitations provisions of 26 U.S.C. §6501.[2]

I.

The facts in each proceeding are undisputed.[3] In the first case, Ernest Badaracco, Sr. and Ernest Badaracco, Jr. were equal partners in an electrical contracting business, Badaracco Brothers and Company. They

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1. These cases were not consolidated. They were, however, argued together and contain no relevant differences of fact. We will, therefore, discuss them in a single opinion.

2. 26 U.S.C. §6501 provides in relevant part:

> (a) Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
>
> . . .
>
> (c) Exceptions.
>
> (1) False return. In the case of a false return or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

3. Deleet Merchandising Corporation denies any fraud on its part in the preparation of its income tax returns. The district court, however, assumed that the original returns were fraudulent for the purposes of the summary judgment motion, and we must make the same assumption in deciding the appeal from that decision.

filed individual and partnership returns for the years 1965 to 1969, which fraudulently understated their taxable income. After federal grand juries subpoenaed the partnership's books and records, the taxpayers, on August 17, 1971, filed amended returns for each of the years in question. Three months later, on November 17, 1971, the Badaraccos were indicted on fifteen counts under 26 U.S.C. §7206(1) for filing false and fraudulent income tax returns for the years 1965 to 1969. They each entered a plea of guilty to the charge of filing a false and fraudulent partnership tax return for 1967, and the district court entered a judgment of conviction on June 6, 1973. *United States v. Badaracco*, (N.J. Crim. No. 766-71). The remaining counts of the indictment were dismissed. Four and one-half years after the conviction, the Commissioner of Internal Revenue issued deficiency notices for each of the five years in question. The Badaraccos asserted that the Commissioner's action was time-barred by 26 U.S.C. §6501(a), because more than three years had passed since the filing of their non-fraudulent, amended returns. The Tax Court agreed, and the Commissioner appealed to this Court.

In the second case, Deleet Merchandising Corporation ("Deleet") filed timely corporate income tax returns for the years 1967 and 1968. Amended returns for these years were then filed on August 9, 1973. Following lengthy criminal and civil investigations, the Internal Revenue Service ("I.R.S.") issued a notice of deficiency to Deleet on December 14, 1979 for the years 1967 and 1968. The taxpayer paid the deficiencies and penalties assessed on or about December 27, 1979, and then filed a complaint in district court to recover those monies. On December 14, 1981, Deleet moved for summary judgment on the ground that even if the original returns had been fraudulent, the deficiencies and penalties could not be assessed more than three years after the filing of a non-fraudulent amended return. The district court granted the motion and the Commissioner appealed.

Appendix C

II.

To support their claims that the three year statute of limitations has run, the taxpayers rely principally on *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and the cases which have followed it. *Britton v. U.S.*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion* (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744); *see also, Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Deyel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981); *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*). The *Dowell* court held that a fraudulent return was in effect no return at all, because the taxpayer had failed to evince "an honest and genuine effort to satisfy the law" within the meaning of *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), and *John D. Alkire Inv. Co. v. Nicholas*, 114 F.2d 607 (10th Cir. 1940).[4] It then reasoned that the fil-

4. *Zellerbach Paper* presented essentially the opposite of the problem posed by this case. A taxpayer filed a non-fraudulent return. Subsequent to the filing of that return, Congress passed the Revenue Act of 1921 which applied retroactively and had a *de minimis* effect on the tax liability of the company. After the limitations period had run, the government attempted to assess large deficiencies, on grounds unrelated to the 1921 Act, on the theory that the failure to file an amended return rendered the original return a nullity and tolled the statute of limitations. The Supreme Court rejected the argument, noting that where a return purported to be a return and evinced an honest and genuine endeavor to satisfy the law it would not be treated as a nullity because of inaccuracies or omissions. "Supplement and correction in such circumstances *will not take* from a taxpayer, *free from personal fault*, the protection of a term of limitation *already running for his benefit*." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934) (emphasis added). Nothing in the opinion suggests that a culpable taxpayer, who files a fraudulent return with the intent to evade tax, renders the original fraudulent return a nullity for the purpose of the statute of limitations, by filing an amended return.

ing of a non-fraudulent, amended return subsequent to the filing of a false and fraudulent original return would have exactly the same effect as the filing of a late original return following the fraudulent failure to file any return at all. Because in *Bennett v. Commissioner*, 30 T.C. 114 (1958), *acq.* 1958-2, C.B. 3, the Tax Court had held that the late filing of a non-fraudulent return began the running of the general three year statute of limitations, the court in *Dowell* concluded that the filing of a non-fraudulent amended return after the filing of an original fraudulent return also started the running of the limitations period. We disagree.

Section 6501(c)(1) is clear on its face. It permits the Commissioner "[i]n the case of a false or fraudulent return with the intent to evade tax" to assess the tax or proceed in court without an assessment "*at any time.*" 26 U.S.C. §6501(c)(1) (emphasis added). There is nothing in the statute, its legislative history, or the regulations to indicate that the subsequent filing of an amended return has any effect on this provision.[5]

Original returns which are filed late, in contrast, are dealt with explicitly in section 6501(a):

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed

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5. We note that the treatment of amended returns is a matter of internal administration, and solely within the discretion of the Commissioner. Miskovsky v. U.S., 414 F.2d 954, 955 (3d Cir. 1969). Neither the Internal Revenue Code nor the Treasury Regulations make any provision for the acceptance of an amended return in place of the original return previously filed. Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977); Kearney v. A'Hearn, 210 F. Supp. 10, 16-17 (S.D.N.Y. 1962), *aff'd per curiam*, 309 F.2d 487 (2d Cir. 1962). *See also* Kaltreider Constr., Inc. v. United States, 303 F.2d 366, 368 (3d Cir. 1962), *cert. denied*, 371 U.S. 877 (1962) (three year period of limitation for filing refund claim is not altered by the filing of an amended return).

(whether or not such return was filed on or after the date prescribed).

(Emphasis added.) There is no comparable language relating to fraudulent original returns, and we have no reason to believe that Congress acted inadvertently when it treated the two situations differently.[6]

III.

Section 6501, as the district court noted in *Britton v. United States*, "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiences." 532 F. Supp. at 278. We find no evidence that Congress struck that balance in such a way as to permit the Commissioner only three years to proceed against persons who filed fraudulent original returns and later submitted non-fraudulent amended returns.

According to the taxpayers, if a citizen has alerted the government to problems with an original tax return by filing an amended return, there is no need to permit the Commissioner unlimited time to assess taxes and deficiencies; furthermore, treating repentent and unrepentent tax evaders alike under section 6501(c)(1) removes all incentive for taxpayers to amend their fraudulent returns. They also assert that to allow the I.R.S. unlimited time to dangle the threat of prosecution, like the sword of Damocles, over the heads of persons who have filed

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6. The court in *Dowell* declared that section 6501(c)(1) and section 6501(c)(3) are *in pari materia* and should, therefore, be construed consistently with one another. We agree with that statement but reach a different conclusion, because we believe that Congress provided a clear indication in section 6501(a) that it did intend "statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file." Dowell v. Commissioner, 614 F.2d at 1266.

amended returns is to invite abuse.[7] The relevant question, however, is not whether it would be wise for Congress to create incentives for filing amended returns after fraudulent returns were filed or to restrict the ability of the Commissioner to assess taxes at any time, but rather whether Congress, in fact, did so. We are limited to interpreting the statute before us. It is not our role to set tax policy.

Not only is the language of this section of the statute relating to fraudulent returns clear, but nothing in the structure of the Internal Revenue Code leads us to believe that Congress intended parties who filed fraudulent returns to be permitted to take advantage of the general three year statute of limitations. The willful filing of fraudulent returns with intent to evade tax is consistently treated as the most serious form of tax evasion. A person who commits such fraud subjects himself to major civil and criminal penalties. He cannot escape those penalties or eradicate the fraud merely by filing a non-fraudulent amended return.

The Commissioner has six years to assess deficiencies against taxpayers who omit more than 25 percent of their gross income from their original returns.[8] Amend-

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7. The appellees have pointed to no cases in which the Commissioner has used his power under section 6501(c)(1) to prosecute fraud "at any time" in an abusive way. As the government notes in its brief, there are no real incentives for it to delay bringing civil assessment actions and very powerful incentives for it to act as quickly as possible. Delays serve only to make it more difficult for the I.R.S. to carry its burden of proof in fraud cases. The Commissioner, recognizing the problems inherent in delay, specifically requires agents to keep investigations involving possible fraud as "current" as any other type of case, even though the agents theoretically are faced with no limits on when such actions could be brought. II Audit, CCH Internal Revenue Manual, §4565.51(3).

8. 26 U.S.C. §6501(e)(1)(A) states:

> *Substantial omission of items.* Except as otherwise provided in subsection (c)—

ed returns have no effect on the six year period. *Houston v. Commissioner*, 38 T.C. 486 (1962); *Goldring v. Commissioner*, 20 T.C. 79 (1953). If, therefore, section 6501 were read as the taxpayers in these appeals urge us to do, we would create a situation in which persons who committed willful, deliberate fraud would be in a better position than those who, without an intent to commit fraud, had omitted more than 25 percent of their gross income from their original returns. There is no basis for concluding that in the single area of the statute of limitations Congress intended so to favor persons or corporations that have perpetrated tax fraud.

Moreover, the I.R.S. has advanced strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility of proceeding both civilly and criminally. *Cf. United States v. LaSalle National Bank*, 437 U.S. 298, 308-309 (1978). It has long been the policy of the I.R.S. to defer civil assessment and collection until the completion of criminal proceedings. *See, e.g.*, Policy Statement P-4-84, 1 Administration, CCH Internal Revenue Manual, ¶1218; IV Audit, CCH Internal Revenue Manual, ¶¶4565.32(2) and 4565.42. This policy, which the Fifth Circuit characterized as both "necessary and wise," *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), permits the I.R.S. to avoid the serious constitutional problems that could be created by simultaneous

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(1) Income taxes. In the case of any tax imposed by subtitle A —

(A) General rule. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

proceedings, problems which can limit, for example, the availability of the ordinary tools for investigating civil tax liability once the commitment is made to refer a case for criminal prosecution. *U.S. v. LaSalle National Bank, supra.*

It is, furthermore, simply not the case that once an amended return is filed, the Commissioner can easily discover the fraud in the original return. The I.R.S. faces a heavy burden of proof in fraud cases, and thorough investigation of such frauds is a time-consuming process. *Klemp v. Commissioner*, 77 T.C. 201, 212-213 (1981) (Parker, J. dissenting). When passing the Act, Congress certainly knew of I.R.S. procedures and of the problems involved in ferreting out fraud. There is nothing to indicate that Congress intended to imply a term, absent in the statute itself, that would force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time.

IV.

As Learned Hand reminded us, "[t]here is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed." *F.D.I.C. v. Tremaire*, 133 F.2d 827, 830 (2d Cir. 1943). But the courts in their search for the true purpose of Congress should not lightly go beyond the plain language of the statutes they are supposed to be interpreting and arrogate to themselves the power to divine in oracular fashion which among constitutionally permissible alternatives is the appropriate one.

The decision of the Tax Court in *Badaracco* and the judgment of the district court in *Deleet* will be reversed, and these cases will be remanded for further proceedings consistent with this opinion.

Appendix C

HUNTER, *Circuit Judge, dissenting:*

1. The majority holds that the filing of a non-fraudulent amended return after the filing of a fraudulent original return does not start the running of the three year statute of limitations in I.R.C. §6501(a) (1976) for the assessment of tax. I respectfully dissent.

2. The underlying facts involved in these appeals are not in dispute. In both cases, taxpayers originally filed fraudulent tax returns with the Commissioner. They later filed amended returns covering the same taxable periods. The Commissioner concedes that the amended returns were non-fraudulent and that they contained all the information the law required in the original filings. Over six years after the filing of the amended returns, the Commissioner issued deficiency notices for taxes allegedly owed by the taxpayers. Taxpayers sought relief,[1] arguing that the Commissioner's actions were barred by I.R.C. §6501(a) (1976), which requires the Commissioner to initiate the assessment and collection of tax within three years of the filing of a return. The Commissioner argued that his action was timely under section 6501(c)(1), which allows the Commissioner to initiate the assessment and collection of taxes at any time after the filing of a fraudulent return. I.R.C. §6501(c)(1) (1976). Applying the reasoning of *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and *Klemp v. Commissioner*, 77 T.C. 201 (1981), *appeal docketed*, No. 81-7744 (9th Cir. November 5, 1981), the courts below found for the taxpayers. These appeals followed.

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1. In *Badaracco* the taxpayer filed a petition with the tax court for a redetermination of the deficiency under I.R.C. §6213(a) (1976 & Supp. IV 1980). In *Delert* the taxpayer paid the tax and then sought a refund in the District Court for the District of New Jersey pursuant to I.R.C. §7422 (1976 & Supp. IV 1980) and 28 U.S.C. §1346(a)(1) (1976).

Appendix C

3. Section 6501 lays out the basic time limitations on the assessment and collection of taxes by the Commissioner. Section 6501(a) provides in relevant part:

> (a) **General rule.** — Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

I.R.C. §6501(a) (1976). Section 6501(c)(1) provides:

> (1) **False return.** — In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

I.R.C. §6501(c)(1) (1976). Interpreting these two provisions, the majority finds section 6501(c)(1) to be "clear on its face" and holds it to be a complete exception to section 6501(a), even when the taxpayer files a subsequent, non-fraudulent amended return.

4. While recognizing that "[t]he starting point in every case involving construction of a statute is the language itself," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring), the Court has recently admonished that "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . . This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt v. Alaska*, 451 U.S. 259, 266 (1981), *quoting Boston Sand Co. v. United*

States, 278 U.S. 41, 48 (1928).[2] In this case sufficient persuasive evidence exists to lead me to a different conclusion than the majority about the proper interpretation of section 6501. Because amended returns are not an explicit part of the statutory scheme, because a reasonable alternative reading of the statutory scheme is apparent, and because the majority's holding leads to distorted results, I am unable to accept the majority's reading of the statute's "plain meaning."

5. First, although section 6501(c)(1) might be "clear on its face" concerning the Commissioner's statutory authority to act when a false or fraudulent return is *first* filed, it is not "clear" on the issue presented here, the effect of a *subsequent* filing of a non-fraudulent amended return. The majority itself acknowledges, majority op. at ____ n.4, that Congress has not provided for amended returns under the statute and that the Commissioner's treatment of them is a matter solely within his discretion. *Koch v. Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977); *Miskovsky v. United States*, 414 F.2d 954, 955-56 (3d Cir. 1969); *Lion Associates, Inc. v. United States*, 515 F. Supp. 550 (E.D. Pa. 1981).[3] They

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2. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

3. Taxpayers point to one provision which mentions "amendments" to returns. I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto. . . ." The legislative history indicates that this definition was in-

are a creation of the Internal Revenue Service and not of Congress. It is thus difficult to understand how their effect on the statute of limitations can be discerned solely from the language of the statute when Congress made no provision for amended returns within the statutory scheme.

6. Second, *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), offers a reasonable alternative interpretation of section 6501. *Accord Britton v. United States*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion*, No. 82-6246 (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), appeal docketed, No. 81-7744 (9th Cir. November 5, 1981).[4] In *Dowell*, the court recognized that the fraudulent original return is not a "return" for the purposes of section 6501(a). The court cited *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), in which the Supreme Court held that the statute of limitations began to run against deficiency assessments upon the filing of a first return if the first return is proper. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such. . . . and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180. Applying this princi-

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NOTE — (*Continued*)

cluded to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-78 (1976). It does not indicate that Congress explicitly included amended returns within the statutory scheme.

4. *See Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Deyel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981), *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*).

ple to the instant situation, the *Dowell* court reasoned that a fraudulent return is not an honest and genuine effort to satisfy the law and thus does not start the running of any statutory limitation period. *Dowell*, 614 F.2d at 1265-66; *cf. Kaltreider Construction Co. v. United States*, 303 F.2d 366, 368 (3d Cir.), *cert. denied*, 371 U.S. 877 (1962) (the first return must be complete and meet the statutory requirements; the statute of limitations will begin to run only upon the filing of a proper return) (dicta). Section 6501(c)(1) does apply whenever an inadequate return is filed, not as a statute of limitations, but rather as a provision allowing the government to institute a suit at any time.[5] When a valid return is filed, even in the form of an amended return to a previously filed fraudulent return, the limitation period of section 6501(a) begins to run.

7. Third, the *Dowell* court's statutory reading of section 6501 "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiencies." *Britton*, 532 F. Supp. at 278. While a fraudulent return may put the Commissioner at a special disadvantage in detecting errors, the filing of an amended return removes the disadvantage by providing the Commissioner with all the information required by law. The general rule, therefore, should govern. *Dowell*, 614 F.2d at 1265.[6] That interpretation also avoids the distorted re-

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5. As the Tenth Circuit recognized in *Dowell*, §6501(c) "represents the antithesis of a limitation period." 614 F.2d at 1265-66.

6. That reading is also consistent with the language of §6501(a) that tax must be assessed within three years after a return is filed "whether or not such return was filed on or after the date prescribed." I.R.C. §6501(a). When no return is filed, the Commissioner is able to act "at any time" under I.R.C. §6501(c)(3). If a return is later filed, however, the Commissioner then has all the necessary information to assess what tax is due, and the general three year period applies. *Dowell*, 614 F.2d at 1265; *Bennett v. Commissioner*, 30 T.C. 114, 124 (1958).

sult reached by the majority. Under the majority's holding, once a fraudulent return is filed, the threat of future assessment of deficiencies will hang in perpetuity like the Sword of Damocles over the head of the taxpayer, despite his efforts to set the record straight.[7]

8. In reaching my conclusion, I do not purport to set tax policy, rather merely to interpret the tax code in light of congressional purpose. *See Rose v. Lundy*, ____ U.S. ____, ____ (1982) (when Congress never thought of the problem, courts must examine a statute's underlying purposes to determine its proper scope); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."). My interpretation of section 6501 reflects the factual reality that the Commissioner has made amended returns an integral part of the administrative scheme,[8] even though Congress did not make it an explicit part of the statutory scheme. The differing conclusions reached by the majority and the tenth circuit indicate that Congress' intent under this provision is far from clear and that perhaps section 6501 is a proper area for further legislative scrutiny. I am unable nonetheless to join the majority's hold-

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7. The application of the three year statute of limitations will not allow a taxpayer who previously filed a fraudulent return to "escape [the] penalties or erase the fraud merely by filing a non-fraudulent amended return." Majority op. at ____. The taxpayer is still subject to civil and criminal sanctions as long as the Commissioner acts within three years.

8. The Commissioner's regulations provide for the use of amended returns by the Internal Revenue Service. *See, e.g.*, 26 C.F.R. §§301.6211-1(a), 6402-3(a)(5) (1982). When the I.R.S. has accepted amended returns, as in this case, the courts have given them effect. *E.g., United States v. Samara*, 643 F.2d 701, 704 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981); *Bookwalter v. Mayer*, 345 F.2d 476, 480 (8th Cir. 1965).

ing that section 6501, as presently written, does not provide for the application of a three year statute of limitations in this case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D — OPINION OF THE UNITED STATES TAX COURT IN *BADARACCO, ET AL. v. COMMISSIONER OF INTERNAL REVENUE*

T.C. Memo. 1981-404

UNITED STATES TAX COURT

ERNEST BADARACCO, SR. and ROSE BADARACCO, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

ERNEST BADARACCO, JR. and BARBARA BADARACCO, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 1700-78, 1701-78 Filed August 5, 1981.

John J. O'Toole, for the petitioners.

Robert B. Marino, for the respondent.

MEMORANDUM OPINION

PARKER, *Judge:* Respondent determined the following deficiencies in Federal income taxes and additions to the tax in these consolidated cases:

Ernest Badaracco, Sr. and Rose Badaracco — Docket No. 1700-78

Year	Deficiencies in Income Tax[1]	Additions to the Tax Sec. 6653(b)[2]
1964	$21,072.39	$10,536.20
1965	- 0 -	9,226.74

1. Since the petitioners in each docket paid the deficiencies for the years 1965 through 1969 when they filed their amended returns for those years, the statutory notices issued by respondent more than six years after the filing of the amended returns showed no deficiencies for those years.

2. Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable years here involved.

Appendix D

1966	- 0 -	9,998.11
1967	- 0 -	19,912.45
1968	- 0 -	24,916.43
1969	- 0 -	27,175.44

Ernest Badaracco, Jr. and Barbara Badaracco — Docket No. 1701-78

Year	Deficiencies in Income Tax	Additions to the Tax Sec. 6653(b)
1964	$20,331.07	$10,165.54
1965	- 0 -	8,775.99
1966	- 0 -	9,071.82
1967	- 0 -	18,969.97
1968	- 0 -	23,304.95
1969	- 0 -	24,503.43

The petitioners in each docket have conceded the deficiency in income tax for the taxable year 1964, and each petitioner-husband has conceded the addition to the tax pursuant to section 6653(b) for the taxable year 1964. For the taxable years 1965 through 1969, petitioners later filed nonfraudulent amended returns and paid the tax due thereon. Only the additions to the tax pursuant to section 6653(b) remain in dispute for those years. The only issue for decision is whether the filing of nonfraudulent amended returns, subsequent to having filed fraudulent returns, entitled petitioners to the three-year statute of limitations in section 6501(a) so as to bar the assessment and collection of the additions to tax for fraud for the years 1965 through 1969.

Most of the facts have been stipulated and are so found. The stipulation of facts is incorporated herein by this reference.

Appendix D

Other findings are based upon admissions in the pleadings and petitioners' responses to respondent's request for admissions.

Petitioners Ernest Badaracco, Sr. and Rose Badaracco (hereinafter Ernest, Sr.), petitioners in Docket No. 1700-78, resided in Hoboken, New Jersey, at the time they filed their petition in this case. Petitioners Ernest Badaracco, Jr. and Barbara Badaracco (hereinafter Ernest, Jr.), petitioners in Docket No. 1701-78, resided in Fort Lee, New Jersey, at the time they filed their petition in this case. Ernest, Sr. and Ernest, Jr. are father and son. During the years in issue, they were equal partners in Badaracco Brothers and Company, an electrical contractor. All of the petitioners filed original joint Federal income tax returns for the taxable years 1965 through 1969 on the following dates:

Year	Date Filed
1965	April 15, 1966
1966	April 15, 1967
1967	April 15, 1968
1968	May 28, 1969
1969	April 15, 1970

Badaracco Brothers and Company filed original forms 1065 for the taxable years 1965 through 1969 on the cash method of accounting on the same dates as the petitioners filed their individual returns. All of the original returns were timely filed except the returns for 1968.

For purposes of these cases, petitioners have conceded the fraudulent nature of these original income tax returns and partnership information returns.

Appendix D

On November 17, 1971, Ernest, Sr. and Ernest, Jr. were indicted on 15 counts under section 7206(1)[3] for filing false and fraudulent individual income and partnership tax returns for the years 1965 through 1969. They entered a plea of guilty to the charge of filing a false and fraudulent partnership tax return for the year 1967. The remaining counts of the indictment were dismissed. Petitioners Ernest, Sr. and Ernest, Jr. have conceded here that there was an underpayment of the tax required to be shown on their original returns for each of the years 1965 through 1969 and that those underpayments were due to fraud within the meaning of section 6653(b).

On August 17, 1971, petitioners filed nonfraudulent amended income tax returns and partnership information returns for each of the taxable years 1965 through 1969. The taxes reported on the amended returns were paid at the time the returns were filed and were timely assessed. Respondent issued his statutory notices of deficiency in each of these cases on November 21, 1977, more

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3. SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declaration Under Penalties of Perjury.*— Willfully makes and subscribes any return, statement, or other documents, which contains or is verfied by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

than six years after the filing of the nonfraudulent amended returns.

The only issue for decision is whether the assessment and collection of the fraud penalties under section 6653(b) for the years 1965 through 1969 is barred by the three-year statute of limitations in section 6501(a).[4] Section 6501 provides in pertinent part as follows:

> SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.
>
> (a) *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed). . . .
>
> • • •
>
> (c) *Exceptions.*—
>
> (1) *False Return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court

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4. Petitioners have conceded that the additions to the tax under section 6653(b) are in the amounts as set out in the statutory notices of deficiency in these cases. Therefore, there is no dispute as to the amounts of the fraud penalties, if assessment and collection is not barred. The additions to the tax for each of the taxable years 1965 through 1969 were calculated upon the underpayments shown on the amended returns, *i.e.* the difference between the tax shown on the original return and the amended return for each year.

for collection of such tax may be begun without assessment, at any time.[5]

Petitioners argue that their filing of nonfraudulent amended returns subsequent to their filing of fraudulent original returns renders the unlimited period for assessment in section 6501(c)(1) inapplicable and triggers the three-year period of limitations in section 6501(a). Respondent argues that the applicable period of limitations was determined by the nature of the fraudulent original returns and was the unlimited period provided by section 6501(c)(1). In support, respondent contends that no language in section 6501 and no subsequent action by petitioners rendered section 6501(c)(1) inapplicable or served to bring section 6501(a) into operation.

We recently decided this same question in the taxpayer's favor in a court reviewed decision that involved a factual situation almost identical to the one herein. *Klemp v. Commissioner*, 77 T.C. No. 17 (August 5, 1981). Our decision in *Klemp* is dispositive of the issue in the present case.[6] Accordingly, we hold that the fraud

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5. Section 250(d) of the Revenue Act of 1921, ch. 136, 42 Stat. 265 for the first time provided for a period of limitations for assessment and collection of taxes. Section 250(d) required the Commissioner of Internal Revenue to determine and assess taxes within four years after a return was filed. With respect to a false or fraudulent return or a failure to file a required return, section 250(d) retained the prior unlimited period for determining and assessing taxes. Now of course the three-year period in section 6501(a) is the general rule and the unlimited period in the case of a false or fraudulent return in section 6501(c)(1) is referred to as an exception to the general rule.

6. While I still adhere to the views expressed in my dissenting opinion in *Klemp*, I of course accept the majority opinion as the law in this Court. In *Klemp*, the Court followed the decision of the 10th Circuit Court of Appeals in *Dowell v. Commissioner*, 614 F. 2d 1263 (10th Cir. 1980), revg. and remg. 68 T.C. 646 (1977). Any appeal in the present case would lie to the Third Circuit.

penalties determined by respondent for the years 1965 through 1969 are barred by the three-year statute of limitations in section 6501(a). To reflect the concessions and the holding of the Court

Decisions will be entered in each docket for the respondent for the taxable year 1964 and for the petitioners for the taxable years 1965 through 1969.

APPENDIX E — OPINION IN *RAYMOND D. KLEMP, et al v. COMMISSIONER OF INTERNAL REVENUE*

77 T. C. No. 17

UNITED STATES TAX COURT

RAYMOND D. KLEMP and ANN L. KLEMP, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 14491-79.

Filed August 5, 1981

Petitioners filed fraudulent original income tax returns for 1970, 1971, 1972 and 1973. On October 17, 1974, petitioners filed nonfraudulent amended returns for those years. More than three years after the filing of the amended returns, but within six years of the filing of the original fraudulent 1973 return, respondent issued his notice of deficiency. *Held,* respondent's proposed assessment is barred by the statute of limitations provided in section 6501(a) which began running on the filing of the amended returns. *Dowell v. Commissioner,* 614 F. 2d 1263 (10th Cir. 1980), revg. 68 T.C. 646 (1977), followed. *Held, further,* the six year statute of limitations provided in section 6501(e) did not apply to 1973.

Kevin O'Connell, for the petitioners.

Gary R. DeFrang, for the respondent.

Appendix E

OPINION

HALL, *Judge*: This case is before the Court on petitioners' motion for summary judgment. Rule 121, Tax Court Rules of Practice and Procedure.

Respondent determined deficiencies in petitioners' taxes, plus additions to tax for fraud under section 6653(b)[1] as follows:

Year	Deficiency	Addition to Tax Under Sec. 6653(b)[2]
1970	$ 1,347	$ 1,868
1971	1,452	4,111
1972	2,079	7,658
1973	4,860	10,946

The issue for decision is whether the statute of limitations bars the assessment and collection of deficiencies in income taxes and additions to the taxes for the years 1970 through 1973.

For purposes of this motion only, the facts have been fully stipulated and are found accordingly.

Raymond D. and Ann L. Klemp, husband and wife, resided in Eugene, Oregon, at the time they filed their petition. Petitioners timely filed joint income tax returns for the years 1970, 1971 and

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1. All section references are to the Internal Revenue Code of 1954, as in effect during the years in issue.

2. The fraud penalties are larger than the deficiencies because the deficiencies are based on the amended returns while the fraud penalties are based on the original returns. See section 6653(c)(1).

1973. Petitioners filed their 1972 joint income tax return on June 21, 1973. (These returns will be referred to as petitioners' "original" returns.)

There was an underpayment of the tax required to be shown on petitioners' original returns for each of the years 1970 through 1973. All or a part of each such underpayment was due to fraud. Petitioners omitted from their original 1973 return gross income in excess of 25 percent of the gross income reported and failed to disclose receipt of such omitted gross income on the return or in a statement attached thereto.

In a letter dated July 26, 1974, respondent notified petitioners that their original 1973 return was to be audited. On October 17, 1974, petitioners met for the first time with a representative of respondent. At that meeting they presented respondent's representative with amended income tax returns (the "amended" returns) for the years 1970 through 1973.

None of petitioners' amended returns omits gross income exceeding 25 percent of the reported amounts. In addition, the tax underpayments, if any, not reported on the amended returns are not due to fraud.

Respondent issued his notice of deficiency in this case on July 9, 1979.

In their motion for summary judgment petitioners claim that respondent's proposed assessments are barred by the statute of limitations found in section 6501(a).[3] Respondent, on the other

3. Section 6501(a) provides:

> (a) General Rule.--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) ***

(Cont'd)

hand, asserts that since petitioners' original returns were fraudulent, section 6501(c)(1)[4] controls and he may assess a tax at any time.

Alternatively, respondent contends that since petitioners' original fraudulent 1973 return omitted from gross income an amount in excess of 25 percent of the amount reported, his proposed assessment for 1973 is not barred because the applicable period of limitations is 6 years as provided in section 6501(e).[5]

This case presents the same question we addressed in *Dowell v. Commissioner*, 68 T.C. 646 (1977), revd. 614 F. 2d 1263 (10th

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(Cont'd)

and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

4. Section 6501(c)(1) provides:

(c) EXCEPTIONS.--

(1) FALSE RETURN.--In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

5. The relevant portion of section 6501(e) is section 6501(e)(1)(A), which provides:

(A) GENERAL RULE.--If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. • • •

Cir. 1980). In *Dowell* the taxpayers initially filed fraudulent income tax returns for the years 1963 through 1966. Subsequently, the taxpayers filed nonfraudulent amended returns. More than three years after the filing of the amended returns, respondent and the taxpayers entered into agreements to extend the period of limitation for assessing a tax. Respondent ultimately issued his notice of deficiency within the time provided for by the extensions. Since the extensions are valid only if executed within the period of limitations (section 6501(c)(4)), the question in *Dowell* was whether the amended returns barred respondent from the assessment and collection of taxes.

We held that petitioners' filing of the original fraudulent returns controlled the period of limitations, that the amended returns had no effect on the period of limitations, and, accordingly, under section 6501(c)(1) respondent was entitled to assess the tax at any time. The Tenth Circuit reversed.

In the present case, petitioners ask that we abandon our position in *Dowell* and adopt the position of the Tenth Circuit. Based on a thorough reevaluation of this issue, we conclude that the Tenth Circuit's result in *Dowell* is correct.

Section 6501(a) provides that, except as otherwise provided, the period of limitations for the assessment of a tax runs for three years after the return is filed. The two major categories of exceptions to this general rule are found in sections 6501(c) and 6501(e). Section 6501(c)(1) provides that in the case of the filing of a false or fraudulent return with the intent to evade tax, the tax may be assessed at any time. Section 6501(e) provides that, except as otherwise provided in section 6501(c), in the case of a taxpayer who omits from gross income an amount in excess of 25 percent of the gross income reported on the return, the tax may be assessed at any time within six years after the return was filed.

Appendix E

The Tenth Circuit in *Dowell* pointed out that unlike sections 6501(a) and 6501(e), section 6501(c)(1) is not a statute of limitations but rather the antithesis thereof.[6] Section 6501(c)(1) provides that under certain circumstances there is no period of limitations. The entire thrust of the Tenth Circuit's opinion, with which we agree, is that the filing of the amended returns did not change a period of limitations but rather started one. Prior to the filing of petitioners' amended returns in this case, no period of limitations was running. Upon the filing of the correct amended returns, the three-year statute of limitations started running.[7]

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6. That section 6501(c)(1) is not a statute of limitations can be discerned from an examination of what constitutes a statute of limitations. A statute of limitations *limits* the time within which an action can be taken. See 53 C.J.S. Limitations of Actions §1; 51 Am. Jur. 2d Limitations of Actions §2. Section 6501(c)(1), as pointed out by the Tenth Circuit, does not provide any time limit on the assessment or collection without assessment of taxes.

In addition, legislative history indicates that Congress does not view section 6501(c)(1) as a statute of limitations. In discussing section 276(a) of the 1934 Code (a predecessor to section 6501(c)(1)) the House Report commented:

> The present law permits the government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return.

H.R. Rept. No. 704, 73d Cong., 2d Sess. 35 (1934). See also S. Rept. No. 558, 73d Cong., 2d Sess. 44 (1934).

7. The Fifth Circuit in *Woolf v. United States*, 578 F. 2d 1103 (5th Cir. 1978), adopted a somewhat different approach in dealing with section 6501(c)(2). In *Woolf* the taxpayer willfully attempted to defeat or evade FICA taxes. Under such circumstances section 6501(c)(2) provides that such taxes may be assessed or collected without assessment at any time. Eventually the taxpayer filed untimely but substantially accurate returns. The taxpayer argued that the filing of such returns started the running of the section 6501(a) period of limitations. The Fifth Circuit disagreed and emphasized that the key inquiry under section 6501(c)(2)

(Cont'd)

Appendix E

Although it can be argued that "the return" in section 6501(a) indicates that for the purpose of the various statutes of limitations contained in section 6501 there is only one return per year, presumably the first return filed,[8] such a narrow reading of the statute is not appropriate when there is a good policy reason for a broader interpretation. While there is a general three-year statute of limitations in section 6501(a), as we have noted above other subparagraphs of section 6501 provide longer or unlimited periods for assessments and collection of the tax. For example, subparagraph (c) provides for no limitation in the case of false returns or no returns, and subparagraph (e) provides for a six-year statute in the case of substantial omissions of income. These various limitations are intended to give respondent adequate time to assess the tax. In *The Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), the Supreme Court noted that the Congressional purpose underlying the enactment of the predecessor to section 6501(e) was

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(Cont'd)
is whether the taxpayer established that his willful attempt to evade taxes ended with the filing of his untimely returns. Based on the taxpayer's failure to establish that fact, the court held that there was no applicable period of limitations. The court specifically stated that, assuming the initial applicability of section 6501(c)(2), it was not deciding whether the period of limitations provided under section 6501(a) would start running upon the later filing of correct amended returns.

8. See, *e.g.*, *Sargent v. Commissioner*, 22 B.T.A. 1270 (1931) (taxpayers' original return started the running of the period of limitations and such period cannot be affected by the filing of amended returns); *Weaver v. Commissioner*, 4 B.T.A. 15 (1926) (statute of limitations begins running on the filing of original--not amended--returns); *National Refining Co. of Ohio v. Commissioner*, 1 B.T.A. 236 (1924) (the phrase "the return" has a definite article and singular subject and therefore can only mean the return contemplated by the relevant statute).

> * * * to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item.

Id. at 36. Similarly, the purpose of section 6501(c)(1) is to provide the Commissioner with an unlimited amount of time when he is at a special disadvantage based on the taxpayer's fraud. This is the position we took in *Bennett v. Commissioner,* 30 T.C. 114 (1958), where we held that the filing of a return subsequent to the fraudulent failure to file a return was sufficient to start the running of the period of limitations. in *Bennett v. Commissioner, supra* at 123-124, we stated:

> For, once a nonfraudulent return is filed, putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think that the statute of limitations begins to run with the filing of such returns. Cf. *J. P. Bell Co.,* 3 B.T.A. 254, 255; *Paul Haberland,* 25 B.T.A. 1370, 1376-1377; *Helvering v. Campbell,* 139 F. 2d 865, 868 (C. A. 4) Accordingly, unless the delinquent returns were themselves fraudulent, the period of limitations began to run on April 21, 1950, when they were filed, * * *.

Based on this reasoning, we can see no reason for not allowing the section 6501(a) period of limitations to control in the present case.[9]

The second issue raised by respondent is his assertion that since petitioners omitted from gross income an amount in excess of 25 percent of the amount reported on their original fraudulent 1973 return, the applicable period of limitations is six years as provided in section 6501(e) instead of the unlimited period contained in section 6501(c). Section 6501(e) explicitly does not apply to situations covered by section 6501(c). Respondent stipulated that petitioners' original 1973 return was fraudulent. Accordingly, no period of limitations began running upon the filing of petitioners' original return. The only period of limitations that ever became applicable in this case is the period provided in section 6501(a), which period expired before respondent mailed his notice of deficiency.[10]

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9. Were respondent not precluded from assessing and collecting the deficiency by the running of the statute of limitations, he would not be prevented from collecting the fraud penalty because petitioners filed amended nonfraudulent returns. It is well established that the filing of an amended return does not affect the amount of an addition to tax which results from a taxpayer's original return. *Bennett v. Commissioner*, 30 T.C. 114, 123 (1958); *George M. Still, Inc. v. Commissioner*, 19 T.C. 1072, 1076-1077 (1953), affd. 218 F. 2d 639 (2nd Cir. 1955).

10. In *Dowell, supra*, at 649, we observed that "[i]t is well settled that when a taxpayer files an original return and thereafter an amended return, the statute of limitations begins to run from the date of the original return, and not the date of the filing of the amended return." Absent a fraudulent return, the filing of a subsequent amended return after an original nonfraudulent return has been filed will, of course, not extend the period of limitations under sections 6501(a) or 6501(e). The respective periods under these sections will continue to commence with the filing of the original return, and not the amended return. See *Houston v. Commissioner*, 38 T.C. 486 (1962).

Appendix E

Based on the foregoing, petitioners' motion for summary judgment will be granted.

An appropriate order and

decision will be entered.

Reviewed by the Court.

WILBUR, *J.*, concurring in part and dissenting in part: I concur in the interpretation of section 6501(c) by the majority. Respondent would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives three score and ten or as long as Methuselah. In most religions one can repent and be saved but in the peculiar tax theology of respondent no act of contrition will suffice to prevent the statute from running in perpetuity. Merely to state the proposition is to refute it, unless some very compelling reasons of policy require visiting this absurdity on the taxpayer. The majority makes it clear that the reasoning of *Bennett v. Commissioner*, 30 T.C. 114 (1958), applies to the question presented in this case.

However, I cannot subscribe to the result the majority reaches under section 6501(e). I believe that based on our decision in *Goldring v. Commissioner*, 20 T.C. 79 (1953), respondent should have 6 years from the date the original 1973 return was due in which to assess and therefore the notice of deficiency was timely when mailed on July 9, 1979. On March 15, 1946, the petitioners in *Goldring* filed their 1945 income tax returns omitting more than 25 percent of the gross income stated therein. On June 16, 1947, petitioners filed amended returns for the 1945 taxable year which purported to correct, in part, the original omission so as to reduce it below 25 percent. Respondent issued a notice of deficiency for 1945 on March 15, 1951, more than 3 years after

the amended return was filed but less than 5 years after filing of the original return. We held that the deficiency notice was timely under section 275(c) (the predecessor of section 6501(e)) since it was issued within 5 years after the original return was filed, although more than 3 years after the amended return. We stated that the 5-year limitation period under section 275(c) started to run upon the filing of the original return and that the filing of the amended return had no effect for statute of limitations purposes.[1]

Similarly, in *Houston v. Commissioner,* 38 T.C. 486 (1962), the taxpayer's wife filed a joint 1953 return on February 10, 1954, having been properly authorized to do so by her husband who was serving in a combat zone. The return reported only the wife's income of $3,968.53. Subsequently, the taxpayer filed a joint return (on June 27, 1955), reporting only his own salary of $7,670.82. A consent to extend the statute of limitations to June 30, 1960, was signed on February 4, 1959. The Commissioner sent a notice of deficiency for 1953 on November 24, 1959. We rejected petitioner's arguments that the statute of limitations had run prior to his signing the consent to an extension. Having found that more than 25 percent of gross income had been omitted from

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1. Similarly, it is well-settled that the filing of an amended return does not alter the period of limitations under sec. 6501(a) (and predecessor section) which started to run upon the filing of the original return. See, e.g., *Vitamin Co. v. Commissioner,* 21 B.T.A. 311 (1930); *Lancaster Lens Co. v. Commissioner,* 10 B.T.A. 1153 (1928). Both sections 6501(a) and (e) contain definite periods of limitations and thus the filing of an amended return (which has no statutory basis, see *Goldring v. Commissioner,* 20 T.C. 79 (1953)), could not alter the period of limitations that started upon the filing of the original return. However, since sec. 6501(c) is not a statute of limitations, no period ever began running at the filing of the original return, and thus the filing of a nonfraudulent amended return changes the character of the original fraudulent return thereby triggering the normal 3-year period of limitations under sec. 6501(a).

the original 1953 joint return filed by the taxpayer's wife, it was held that the statute of limitations ran for 5 years from the due date for the original return (the original return having been filed early):

> Petitioner's second 1953 return is at best an amended return. It is settled law that an amended return does not operate to prevent section 275(c) of the 1939 Code from applying to the original return. *Ira Goldring*, 20 T.C. 79 (1953). As for the case of *Charles F. Bennett*, 30 T.C. 114 (1958), urged upon us by the petitioner, it is sufficient to point out that there we applied the 3-year statute of limitations to an original, albeit delinquent, return. [*Houston, supra* at 489.]

It is thus clear that in the section 6501(e) situation, the original return starts the limitation period and that for such purpose the subsequent amended return is ignored. Both *Goldring* and *Houston* cannot be read any other way, and *Houston* makes it clear that *Bennett*—on which the majority specifically relies—does not alter this result. Even considered on a clean slate, the majority decision on section 6501(e) is wrong; how it can possibly be reached with *Goldring* and *Houston* on the books is beyond me.

The present case involves facts virtually identical to *Goldring* and the parties agree that the taxpayers' original return contained a substantial omission within the meaning of section 6501(e). *Goldring* and *Houston* make it clear that the 6-year statute of limitations applies and a deficiency notice is timely even though it is sent out more than 3 years after the amended return is filed. These cases plainly state that the subsequent filing of an amended return will not affect the limitations period under section 6501(e). Yet the majority now holds under precisely the same circumstances

(except that the dereliction is also accompanied by fraud) that the Commissioner is barred from assessing although the 6-year statute of limitations has not yet run. Not only is this impossible to reconcile with *Goldring* and *Houston*, and the purpose and policy of section 6501, it is anomalous in the extreme to rule that when fraudulent intent accompanies a 25 percent omission the taxpayer's period of exposure under the statute is shortened.

The majority makes short work of the section 6501(e) issue, merely stating that "section 6501(e) explicitly does not apply to situations covered by section 6501(c)." But the statutory language says that the 6-year period provided in section 6501(e) applies "[e]xcept as *otherwise* provided in subsection (c)." (Emphasis added). This simply makes clear the obvious—that where the 6-year period of (e) and the unlimited period of (c) are both applicable, the taxpayer may not confine the respondent to the shorter period. To effectuate this objective, Congress has simply stated that the 6-year period is inapplicable when a period in perpetuity already applies.[2]

Additionally, the majority has compounded its misreading of section 6501(e) with a catch 22 twist that should not be overlooked. It holds that section 6501(e) "does not apply to situations covered by section 6501(c)"—that is where the statute runs in perpetuity. But it has at this point already held the statute doesn't run in perpetuity, that the terms of section 6501(c) are inapplicable. The majority holds not only that the statute applicable to petitioners' 1973 return fails to run in perpetuity,

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2. This is borne out by the respondent's regulations under section 6501(e) which provide: "(c) *Exception.* The provisions of this section do not *limit* the application of section 6501(c)." Sec. 301.6501(e)-1(c), Proced. & Admin. Regs. [Emphasis added.]

but also that it expired on October 17, 1977—about 3 and one-half years after the original return was filed. Put another way, we are told in one breath that the 6-year statute is inapplicable because under section 6501(c) the statute runs in perpetuity, and in the next breath that the statute doesn't run in perpetuity, but for less than 4 years.

Logic and precedent are not the only casualties of this approach, for common sense must be added to the list of the wounded. While Congress has provided the longest period for assessment where fraud is involved--the majority has reversed the procedure. According to the majority, absent fraud, the respondent would have had 6 years to assess under section 6501(e); since it was stipulated fraud was present, he only had 3 and 1/2 years as to 1973. Why fraud should be rewarded over inadvertence or negligence escapes me.

The majority notes that in *The Colony, Inc. v. Commissioner,* 357 U.S. 28, 36 (1958), the Supreme Court explained the purpose of section 6501 as being

[To] give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item.

In *Houston v. Commissioner,* 38 T.C. 486, 490, we added:

As a general proposition, the Commissioner is always at a "special disadvantage" where an item of income is omitted from a return, for whatever reason that item is omitted. We find no rule enunciated here requiring specific prejudice to the Commissioner before section 275(c) becomes applicable.

Appendix E

By providing a period of limitations substantially shorter than the 6-year period afforded by section 6501(e), even though there has admittedly been a 25-percent omission as required by that subsection, the majority simply misinterprets the statute ignoring prior precedent along the way. For these reasons, I respectfully dissent.

PARKER, *J.*, dissenting: I respectfully dissent. The majority holds that, subsequent to the filing of a fraudulent original return, the three-year statute of limitations in section 6501(a) begins to run upon the filing of a nonfraudulent amended return. I believe this interpretation of section 6501 fails to give effect to the plain language of the statute.

Section 6501(a) provides that "Except as otherwise provided in this section, the amount of any tax . . . shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed . . ." As stated by the majority, exceptions to the general rule of section 6501(a) may be found in sections 6501(c) and 6501(e). Section 6501(c)(1) provides that, in the case of the filing of a false or fraudulent return with the intent to evade tax, the tax may be assessed "at any time." Section 6501(e) provides that, except as otherwise provided in section 6501(c), in the case of a taxpayer who omits from gross income an amount in excess of 25 percent of the gross income reported on the return, the tax may be assessed at any time within six years after the return was filed.

In the present case, section 6501(c)(1) applies to the filing of the original fraudulent returns and specifically provides an unlimited period of assessment of the taxes. The majority apparently agrees that the fraudulent returns herein were "returns"

for purposes of triggering the exception in section 6501(c)(1).[1] The majority reasons that, since the fraudulent returns did not start the running of any period of limitations, the nonfraudulent amended returns became the "returns" referred to in section 6501(a) for purposes of starting the three-year statute of limitations.

However, there is no indication in the wording of section 6501 that any action subsequent to the filing of fraudulent original returns, including the filing of nonfraudulent amended returns, renders section 6501(c)(1) inapplicable and triggers section 6501(a). There is no language in the statute requiring that a statute of limitations ever begin running where section 6501(c)(1) applies in the first instance. No subsequent event can alter the fact that petitioners herein filed fraudulent original returns. Just as we have held that the filing of a nonfraudulent amended return does not bar the imposition of the fraud penalty itself, *Bennett v. Commissioner,* 30 T.C. 114, 125 (1958), likewise it should not cut short the time within which that penalty may be assessed.

The main thrust of the majority's opinion is that the policy underlying the unlimited period of limitations in section 6501(c)(1) is to provide respondent with sufficient time to investigate a taxpayer's returns where respondent is at a special disadvantage based on the taxpayer's fraud. The majority believes that that policy no longer applies once, as in the present case, the taxpayer

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1. If the fraudulent returns were not "returns," then section 6501(c)(1) would not apply in the first place. The Ninth Circuit, to which an appeal would lie in this case, has specifically held that a fraudulent return was nevertheless a "return" where it purported to be a return and there was no apparent refusal to comply with the requirements for filing returns. *United States v. Crowhurst,* 46 AFTR 2d 80-5673, 80-2 U.S.T.C. ¶9638 (9th Cir. 1980).

has filed nonfraudulent amended returns putting respondent on notice as to his income and deductions. Thus, according to the majority, once respondent receives a nonfraudulent amended return, he no longer needs an unlimited period within which to assert the fraud penalty.

In support of its position, the majority cites the Supreme Court's language in *The Colony, Inc. v. Commissioner,* 357 U.S. 28 (1958), stating that the purpose of the extended five-year period in the predecessor to section 6501(e) was to give respondent two extra years to investigate returns where he was at a disadvantage due to the taxpayer's omission of items totalling 25 percent of his gross income. However, in the section 6501(e) situation, the subsequent filing of amended returns without substantial omissions does not affect the running of the five [or six] year period which commenced with the filing of original returns with substantial omissions. *Houston v. Commissioner,* 38 T.C. 486 (1962); *Goldring v.Commissioner,* 20 T.C. 79 (1953). In other words, a taxpayer files an amended return correcting the substantial omission in his original return, even though respondent then has all of the facts pertaining to that omission before him and he no longer needs additional time to assess the proper tax, the filing of the amended return does not cut short the original period of limitations.

In the section 6501(c)(1) situation, when a taxpayer files a nonfraudulent amended return in an attempt to correct a fraudulent original return, respondent will have all of the facts relating to the underpayment but will not necessarily have all of the facts he needs to prove by clear and convincing evidence a fraudulent intent to evade tax. Absent proof of that specific intent, evidence of an underpayment standing alone will not support the imposition of the fraud penalty. Thus, while three years may be an adequate period within which to assert the fraud penalty where

the taxpayer's fraudulent intent is established in prior criminal proceedings or by stipulation, the three years may not be enough time for respondent to prove fraudulent intent where a more extensive investigation is required. The majority's interpretation of section 6501 does not take into account respondent's heavy burden of proof in fraud cases.

The situation in *Bennett v. Commissioner, supra,* relied on by the majority, is distinguishable from the present case. The taxpayer in *Bennett* failed to file returns within the meaning of the predecessor to section 6501(c)(3), and his failure to file was fraudulent.[2] We held that the subsequent filing of a delinquent return started the three-year period of the predecessor to section 6501(a).

Section 6501(c)(3) provides that in the case of the failure to file a return, the tax may be assessed at any time. Section 6501(a) expressly applies to a return "whether or not such return was filed on or after the date prescribed." Thus, where a delinquent return is ultimately filed, section 6501(a) clearly applies and renders section 6501(c)(3) inapplicable. In cases such as *Bennett,* it follows that where taxpayers filed delinquent returns, the exception in section 6501(c)(3) by its own terms no longer applied and the three-year period in section 6501(a), by its express terms, began to run on the date the delinquent returns were filed, notwithstanding the fact that the initial failure to file was fraudulent.

Although the policy reasons stated above for allowing respondent an unlimited period to assert and prove fraud also apply to a fraudulent failure to file, Congress did not distinguish

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2. The "failure to file" described in section 6501(c)(3) may be fraudulent or nonfraudulent.

between fraudulent and nonfraudulent failures to file and specifically provided that, in the "no return" situation of section 6501(c)(3) the later filing of a delinquent return shall start the three-year period in section 6501(a). In the present case and in *Dowell v. Commissioner,*[3] however, the exception in section 6501(c)(1) is not rendered inapplicable by the filing of a nonfraudulent amended return. The statute does not say that subsequent events have any affect on the application of section 6501(c)(1) to a fraudulent original return.[4]

There is no language in section 6501 that requires respondent to assert a fraud penalty within three years of the filing of a fraudulent original or nonfraudulent amended return. As for statutory construction, the general rule is that a statute of limitations barring the collection of taxes otherwise admittedly due and owing is to be strictly construed in favor of the Government and its applicability will not be presumed in the absence of clear Congressional action. *Lucia v. United States,* 474 F. 2d 565, 570 (5th Cir. 1973); *McDonald v. United States,* 315 F. 2d 796, 801 (6th Cir. 1963).

Since section 6501 does not expressly limit respondent's time for asserting the fraud penalty, this Court should not impose its own limitation on the unlimited period already provided for asserting and proving the fraud penalty.

TANNENWALD, SCOTT, STERRETT, and CHABOT, *JJ.*, agree with this dissenting opinion.

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3. 614 F. 2d 1263 (10th Cir. 1980), rev'g. and rem'g. 68 T.C. 646 (1977).

4. See *Woolf v. United States,* 578 F. 2d 1103, 1105 (5th Cir. 1978).